Mohammad Reza Lajevardi Taghi v Public Prosecutor

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COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO B-05–85–04 OF 2013 (IRN)
ZAWAWI SALLEH, VARGHESE GEORGE AND PRASAD ABRAHAM JJCA
12 MARCH 2015

B

Criminal Procedure — Trial — Misdirection — Trial judge erred in placing burden upon accused to disprove his knowledge of drugs in secret compartment of bag he was carrying — Trial judge held accused should have called to testify on his behalf person who had given him the bag — Accused in cautioned statement following arrest named person who gave him the bag in Iran but police did not investigate the contention — Whether burden on prosecution to prove accused had knowledge of drugs — Whether trial judge erred in dismissing accused's unsworn statement from dock as valueless just because it could not be tested under cross-examination — Whether trial judge should have adequately and judicially considered all aspects of defence to give accused fair chance of acquittal

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The appellant was found guilty and sentenced to death by the High Court on a charge of trafficking in 419.7g of methamphetamine at the baggage collection area of the arrival hall at the Kuala Lumpur International Airport. The prosecution's prime witness, SP4, a police sergeant who was on duty at the baggage collection area at the material time, noticed the appellant walking towards the exit with a trolley bag ('P15'). The appellant was stopped and P15 was scanned and searched. Apart from clothing, it was found to contain the drugs mentioned in the charge inside a secret compartment. The appellant gave unsworn evidence from the dock to say that because he did not have a bag that was suitable for his travel to Malaysia, he took his clothes in a plastic bag and followed his brother-in-law ('SD2') to a shop belonging to a man named Farshad in Iran where they met Farshad's friend, Akbar, who gave him P15. The appellant said as P15 was empty at the time he put his clothes in it and then went to the bus station and took a bus to Syria. The trial judge gave no weight to the appellant's unsworn statement and ruled that the defence's story was concocted and a bare denial; that the appellant failed to rebut the statutory presumption under the Dangerous Drugs Act 1952 that he had knowledge, custody and control over the drugs and that he had failed to cast a reasonable doubt on the prosecution's case. In the instant appeal against conviction and sentence, the crux of the appellant's submissions was that he had no knowledge of the existence of the drugs in P15.

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Held, allowing the appeal, setting aside the conviction and sentence and acquitting and discharging the appellant:

(1) The burden to prove the appellant had knowledge of the drugs in P15 remained squarely on the prosecution. In his unsworn statement from the dock, the appellant had referred to three persons named Farshad, Akbar and Mahmud in his version of events to support his contention that he had no knowledge of the drugs in the bag. When the investigating officer of the case, SP10, was asked during re-examination whether those three names came up during his investigations, SP10 said the appellant had mentioned the three names in his cautioned statement and also that he had met Akbar before leaving for Malaysia but he (SP10) did not investigate further the involvement of the said three persons in the case. As it stood, it pointed to lack of knowledge on the appellant's part. The trial judge misdirected herself in placing the burden on the appellant to disprove his knowledge of the drugs in the bag by requiring him to have called the said three persons to testify on his behalf. This was a serious misdirection in law which rendered the conviction unsafe (see paras 8, 10–11 & 13–14).

(2) The trial judge misdirected herself when she failed to appreciate adequately the defence of the appellant. The judge should have evaluated the evidence against the prosecution's case to find whether the appellant had rebutted the presumption of knowledge and raised a reasonable doubt on the prosecution's case. The trial judge completely dismissed the appellant's defence as an afterthought simply because his evidence could not be challenged by the prosecution and therefore carried minimal weight compared to the evidence of an accused which was tested under cross-examination. The appellant's unsworn statement should not have been altogether brushed aside but his evidence should have been taken into account along with other evidence in the case (see para 18).

(3) The trial judge failed to give due credence to the evidence of SD2 (the appellant's brother-in-law who corroborated the fact P15 was given by Akbar to the appellant at Farshad's shop) and SD3 and had out-rightly rejected them as an afterthought of the defence. The appellant testified that he saw nothing suspicious in P15 (as the drugs were hidden in a specifically modified compartment of the bag not visible to the naked eye). The appellant's conduct at the airport was not suspicious but showed his innocence. The trial judge should have adequately and judicially considered all aspects of the defence. In that way, the appellant would have had a fair chance of an acquittal (see paras 19(d)–(e), 21 & 24).

[Bahasa Malaysia summary

Perayu didapati bersalah dan dijatuhkan hukuman mati oleh Mahkamah Tinggi atas pertuduhan mengedar 4197g methamphetamine di kawasan mengambil bagasi di balai ketibaan Lapangan Terbang Kuala Lumpur. Saksi utama pendakwaan, SP4, seorang sarjan polis bertugas di kawasan mengambil

bagasi, melihat perayu berjalan terhadap laluan keluar dengan beg troli ('P15'). Perayu diberhentikan dan P15 diimbas dan diperiksa. Selain daripada pakaian, ia didapati mengandungi dadah seperti yang disebut dalam pertuduhan, dalam bahagian rahsia. Perayu memberi kenyataan tidak bersumpah dari kandang tertuduh untuk mengatakan bahawa memandangkan dia tidak mempunyai beg yang sesuai untuk ke Malaysia, dia mengambil pakaian dalam beg plastik dan mengikut abang iparnya ('SD2') ke sebuah kedai milik seorang lelaki bernama Farshad di Iran di mana mereka bertemu dengan rakan Farshad, Akbar, yang memberikan P15 kepadanya. Perayu menyatakan bahawa oleh kerana P15 kosong pada masa dia meletakkan pakaian di dalamnya dan kemudian ke stesen dan menaiki bas ke Syria. Hakim bicara tidak memberi pemberatan kepada kenyataan tidak bersumpah perayu dan memutuskan bahawa cerita pembelaan direka dan merupakan penafian semata-mata; bahawa perayu gagal menyangkal anggapan statutori di bawah Akta Dadah Berbahaya 1952 bahawa dia mempunyai pengetahuan, jagaan dan kawalan terhadap dadah-dadah tersebut dan bahawa dia gagal untuk membangkitkan anggapan munasabah terhadap kes pendakwaan. Dalam rayuan terhadap sabitan dan hukuman ini, inti pati hujahan perayu adalah bahawa dia tidak mempunyai pengetahuan mengenai kewujudan dadah dalam P15.

Diputuskan, membenarkan rayuan, mengenepikan sabitan dan hukuman dan melepaskan dan membebaskan perayu:

(1) Beban untuk membuktikan perayu mempunyai pengetahuan dadah di dalam P15 kekal sepenuhnya pada pihak pendakwaan. Dalam akuan tidak bersumpah dari kandang tertuduh, perayu telah merujuk kepada tiga nama iaitu Farshad, Akbar dan Mahmud dalam versinya mengenai kejadian-kejadian yang menyokong hujahan bahawa dia tidak mempunyai pengetahuan tentang dadah dalam beg. Apabila pegawai penyiasat kes itu, SP10, ditanya semasa pemeriksaan semula sama ada ketiga-tiga nama timbul semasa siasatannya, SP10 menyatakan bahawa perayu telah menyebut tentang tiga nama dalam kenyataan beramarannya dan juga bahawa dia telah menemui Akbar sebelum berlepas ke Malaysia tetapi dia (SP10) tidak menyiasat selanjutnya penglibatan ketiga-tiga orang dalam kes tersebut. Dengan itu, ia menunjukkan kurangnya pengetahuan di pihak perayu. Hakim bicara tersalah arah dirinya dalam meletakkan beban kepada perayu untuk menyangkal pengetahuannya mengenai dadah dalam beg tersebut dengan memintanya memanggil tiga orang tersebut untuk memberi keterangan bagi pihaknya. Ini merupakan salah arah serius dalam undang-undang yang menjadikan sabitan tidak selamat (lihat perenggan 8, 10–11 & 13–14).

(2) Hakim bicara tersalah arah diri beliau apabila beliau gagal mempertimbangkan pembelaan perayu secukupnya. Hakim tersebut sepatutnya menilai bukti terhadap kes pendakwaan untuk memutuskan

sama ada perayu telah menyangkal anggapan pengetahuan dan menimbulkan keraguan munasabah terhadap kes pendakwaan. Hakim bicara menolak pembelaan perayu sepenuhnya sebagai sesuatu yang difikirkan semula hanya kerana keterangannya tidak boleh dicabar oleh pihak pendakwaan dan oleh itu mempunyai berat minimum berbanding dengan keterangan tertuduh yang telah diuji semasa pemeriksaan balas. Kenyataan tidak bersumpah perayu tidak sepatutnya sama sekali diketepikan tetapi keterangannya sepatutnya diambil kira bersama-sama dengan keterangan lain dalam kes tersebut (lihat perenggan 18).

(3) Hakim bicara gagal memberikan kepentingan kepada keterangan SD2 (abang ipar perayu yang menyokong fakta bahawa P15 diberikan oleh Akbar kepada perayu di kedai Farshad) dan SD3 dan telah menolak kesemuanya secara bulat-bulat sebagai suatu pembelaan yang difikirkan kemudian. Perayu memberi keterangan bahawa dia tidak melihat apa-apa yang mencurigakan di dalam P15 (kerana dadah tersebut disembunyikan di dalam bahagian khusus beg tersebut yang diubahsuai yang tidak dapat dilihat dengan mata kasar). Kelakuan perayu di lapangan terbang tidak mencurigakan dan menunjukkan dia tidak bersalah. Hakim bicara sepatutnya mempertimbangkan semua aspek pembelaan sepenuhnya dan secara kehakiman. Dengan itu, perayu akan mempunyai peluang yang baik untuk pembebasan (lihat perenggan 19(d)–(e), 21 & 24).]]]]]

Notes

For cases on misdirection, see 5(3) *Mallal's Digest* (5th Ed, 2015) paras 5833–5848.

Cases referred to

Alcontara a/l Ambross Anthony v PP [1996] 1 MLJ 209; [1996] 1 CLJ 705, FC (refd)

Azahan bin Mohd Aminallah v PP [2005] 5 MLJ 334; [2005] 1 CLJ 374, CA (refd)

Gooi Loo Seng v PP [1993] 2 MLJ 137, SC (refd)

R v Callaghan (1971) 64 Cr App R 11 (refd)

Mohamad Radhi bin Yaakob v PP [1991] 3 MLJ 169; [1991] 1 CLJ (Rep) 311, SC (refd)

Mohd Nazri bin Omar & Ors v PP [2014] 5 MLJ 644; [2014] 1 LNS 576, CA (refd)

Neville v PP [1992] 1 SLR 153 (refd)

Warner v Metropolitan Police Commissioner [1968] 2 All ER 356, HL (refd)

Legislation referred to

Dangerous Drugs Act 1952 ss 37(d), 39B(1)(a), (2)

Appeal from: Criminal Trial No 45A-106 of 2011 (High Court, Shah Alam)

N Sivananthan (Jayarubbiny Jayaraj with him) (Sivananthan) for the appellant.
Muhamad Yasser bin Mohd Nasri (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Prasad Abraham JCA:

INTRODUCTION

[1] The appellant was charged with trafficking in 419.7g of methamphetamine under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the DDA'). He was convicted and sentenced under s 39B(2) of the DDA. Aggrieved, the appellant now appeals to this court.

[2] The charge against the appellant was as follows:

> Bahawa kamu pada 1hb Januari 2011, jam lebih kurang 9.50 pagi, bertempat di Kawasan Tuntutan Bagasi G, Balai Ketibaan Aras 3, MTB, KLIA, dalam Daerah Sepang, di dalam Negeri Selangor Darul Ehsan, telah didapati mengedar dadah berbahaya iaitu Methampetamine seberat 419.7 gram dan dengan itu kamu telah melakukan suatu kesalahan di bawah Seksyen 39B (1)(a) Akta Dadah Berbahaya 1952 yang boleh dihukum di bawah Seksyen 39B(2) Akta yang sama.

[3] The prosecution had called 12 witnesses to testify. At the end of the prosecution's case, the learned trial judge found a prima facie case against the appellant and ordered the appellant to enter his defence. The appellant elected to give unsworn evidence from the dock.

[4] At the end of the defence case, the learned judge found that the appellant had failed to raise any reasonable doubt against the prosecution's case and consequently the appellant was convicted in respect of the said charge and sentenced to death.

FACTS

[5] Briefly, the factual scenario which led to the arrest of the appellant on 1 January 2011 were as follows:

(a) on 1 January 2011, the arresting officer, D/Sarjan Hassan bin Jamil ('SP4'), was on duty at the Baggage Claim Area at the third floor of the Arrival Hall, KLIA from 9 in the morning;

(b) as SP4 was observing Carousel G for the arrival of passengers from flight No QR 620, he noticed that the appellant was walking towards the exit through the green lane with a grey colour trolley bag;

(c) SP4 then directed his team member, D/Kpl Zulkefli, to stop the appellant and ordered D/Kpl Zulkefli to scan the appellant's bag. At the time when the bag was scanned SP4 was also present there with D/Kpl Zulkefli;

(d) after the bag was scanned, SP4 found nothing suspicious appearing on the screen of the scanner. SP4 then asked the appellant to open his bag which the appellant obeyed and opened his bag;

(e) when the bag was opened for SP4 to inspect, SP4 only found clothes in the bag;

(f) SP4 then opened the sides of the bag where he realised it was glued together. SP4 found a piece of white cotton below a hard piece of plastic underneath the bag;

(g) SP4 then took a sample of the white cotton and tested it on a test strip for drugs. The result came back positive for drugs;

(h) SP4 then arrested the appellant and confiscated the appellant's bag. SP4 informed the appellant that there were drugs found in his bag;

(i) SP4 checked the appellant's pouch bag and found nothing suspicious except for his documents and money. SP4 then took away the appellant's passport;

(j) SP4 then made a police report No KLIA Sepang 08/2011 and handed over the exhibits to SP10 at the Narcotic Office in IPD Sepang;

(k) the appellant was charged with trafficking 419.7g methampetamine; and

(l) the prosecution relied on the statutory presumption under s 37(d) of the Dangerous Drugs Act 1952.

FINDINGS OF THE HIGH COURT

[6] At the conclusion of the trial, the learned trial judge found the appellant had failed to cast a reasonable doubt on the prosecution's case and proceeded to find him guilty. The learned trial judge reasoned that:

(a) the appellant's unsworn statement carried no value and thus has no weight for the court to consider;

(b) the defence was a bare denial and the story was concocted;

(c) the appellant had failed to rebut the presumption of knowledge of the incriminating items and he had custody and control over them; and

(d) SD1 and SD2 were 'interested witnesses' who had no knowledge of the facts but only the version told to them by SD3.

OUR FINDINGS

[7] The written submissions of the appellant focuses mainly on the knowledge on the part of the appellant and not possession. And our analysis of the appellant's case proceeds accordingly.

[8] The burden to prove the existence of knowledge on the part of the appellant of the drugs found in the bag remains squarely on the prosecution. We refer to the decision of the Federal Court in *Mohamad Radhi bin Yaakob v Public Prosecutor* [1991] 3 MLJ 169; [1991] 1 CLJ (Rep) 311 where the court held:

> It is a well-established principle of Malaysian criminal law that the general burden of proof lies throughout the trial on the prosecution to prove beyond reasonable doubt the guilt of the accused for the offence with which he is charged. There is no similar burden placed on the accused to prove his innocence. He is presumed innocent until proven guilty. To earn an acquittal, his duty is merely to cast a reasonable doubt in the prosecution case. In the course of the prosecution case, the prosecution may of course rely on available statutory presumptions to prove one or more of the essential ingredients of the charge. When that occurs, the particular burden of proof as opposed to the general burden, shifts to the defence to rebut such presumptions on the balance of probabilities which from the defence point of view is heavier than the burden of casting a reasonable doubt, but it is certainly lighter than the burden of the prosecution to prove beyond reasonable doubt ... If defence is called, the duty of the accused is only to cast a reasonable doubt in the prosecution case. He is not required to prove his innocence beyond reasonable doubt.

[9] The case of *Warner v Metropolitan Police Commissioner* [1968] 2 All ER 356, set some guidelines which have been followed in many jurisdictions including ours. In particular, Lord Wilberfore stated:

> In order to decide between these two (possession and mere control) the jury should ... be invited to consider all the circumstances – the 'modes or events' by which the custody commences and the legal incident in which it is held. By these I mean, relating them to typical situations, that they must consider the manner and the circumstances in which the substance, or something which contains it, has been received, what knowledge or means of knowledge or guilty knowledge as to the presence of the substance, or as to the nature of what has been received, the accused had at the time of receipt or thereafter up to the moment when he is found with it; his legal relation to the substance or package (including his right to access of it). On such matters as these (not exhaustively stated) they must make the decision whether, in addition to physical control, he has, or ought to have imputed to him, the intention to possess, or knowledge that he does possess, what is in fact a prohibited substance. If he has this intention or knowledge, it is not additionally necessary that

he should know the nature of the substance.

[10] Discerning from the proved facts of this instant appeal one will see that appellant has made reference to three persons namely Farshad, Akbar and Mahmud, in his version of the events that took place that would go to support the appellant's contention that the appellant lacked the knowledge of the presence of the drugs in the bag. The public prosecutor had re-examined the investigating officer, Insp Eddy Amin bin Hussin Ala ('SP10'), on these names during the investigation of the case. SP10's evidence at p 183 of the appeal record ('AR') Vol 2 as set out below confirms that:

S: Dalam siasatan awak adakah OKT beritahu tentang pekerjaan beliau dan tentang tugas beliau ke Malaysia?

J: Saya tidak diberitahu.

S: Adakah pada bila-bila masa dalam siasatan kamu timbul nama Akbar, Mahmud dan Farshad?

J: Dalam siasatan saya ada disebut melalui cautioned statement yang diambil oleh pegawai lain.

S: Ada awak siasat lanjut penglibatan nama-nama ini?

J: Tidak.

S: Ada awak diberitahu oleh OKT sebelum beliau datang ke Malaysia beliau ada jumpa Akbar dan beritahu Mahmud akan datang kemudian?

J: OKT tidak beritahu saya secara direct tapi saya tahu melalui cautioned statement OKT yang diambil oleh pegawai lain.

S: Ada OKT beritahu tuan punya sebenar beg P15 kepada awak?

J: Saya tidak ingat.

[11] This version of the appellant has also been referred in his unsworn statement from the dock. The gist of the appellant's case was that the bag was given to him before he travelled to Malaysia by Akbar. This can be inferred from the appellant's evidence which can be found at pp 226–227 of the AR Vol 3:

... After few days I rejected Akbar and told him I don't want to go to Malaysia. Then Farshad recommended me this job is really beneficial for me and I can make money in future. So I decided to come to Malaysia.

Q: P15 refers–grey bag. Can you tell the Court whose this bag belonged to?

A: I have luggage at home but it wasn't suitable for traveling that is why Akbar gave me this luggage. I wanted to buy a luggage in Iran but Akbar said no need to buy. He said 'I have one that I can give to

you.' Akbar mentioned to me 'my luggage is big' and he said I can stay in Syria and Malaysia for 2 weeks and that is why it is better to take large luggage and bring extra clothes with me because the weather was so cold. So I suppose to bring summer clothes with me.

Q: When and where did Akbar give you the bag P15?

A: At the time I left my home to go to Syria. I put all my clothes in plastic bag and I follow my brother-in-law Behruz (SD2) and so we went to Farshad's shop and then Akbar also came to Farshad's shop and gave me this luggage and I put all my clothes in this luggage.

Q: Who asked you to go to Farshad's shop?

A: Akbar and Farshad was good friend. So Farshad asked me to come to his shop because his shop is near to the bus station.

Q: When Akbar gave you the bag P15 is SD2 your brother in-law is around?

A: He was standing with me and we put all the clothes together in the bag P15.

Q: Did you check the bag before you put the clothes in the bag?

A: I did not check because I trust Farshad and Akbar and I don't have any experience with somebody can hide something in the luggage and nothing appeared in the luggage.

Q: Do you have the key to the luggage?

A: No, I don't have.

Q: What happened after you locked the luggage?

A: After I locked the luggage, me and my brother-in-law and went to the bus station and I think the bus went to Syria.

[12] The drugs were placed in a part of the bag where it could not have been easily discovered. SP4's evidence that can be found at pp 39–40 of the AR Vol 1.

> Saya rasa tidak puas hati dan membuat pemeriksaan lanjut ke atas beg tersebut dan saya lihat seolah-olah beg telah diubah suai di bahagian tepi beg seperti ada kesan digam. Saya minta lelaki tersebut menutup beg dan minta beliau menarik beg ke bahagian pejabat Narkotik di Aras 3. Semasa ditahan, saya lihat Saspek memakai beg pouch di pinggang. Saspek menarik beg itu sendiri. Sampai di pejabat Narkotik saya minta beliau buka beg tersebut, saya sendiri membuat pemeriksaan pada beg dengan disaksikan oleh Saspek dan anggota saya. Saya buka bahagian tepi beg yang bergam dan saya lihat ada sekeping kapas putih.

[13] As it stands, it points to lack of knowledge on the part of the appellant. The learned trial judge, in our view, misdirected herself in placing the burden

on the appellant to disprove that the appellant had knowledge of the drugs being in the bag by requiring the appellant to call these three persons to testify on the appellant's behalf. We reproduce the judgment of the learned judge on this matter as below:

> Pihak pendakwaan berhak memanggil mana-mana saksi bagi menyokong kes mereka. *Dalam kes ni nama-nama dan alamat saksi-saksi tersebut tidak dibekalkan kepada pihak pendakwaan, malahan pembelaan juga gagal untuk mencari dan membawa saksi-saksi ini bagi menyokong kes mereka.*
>
> Kegagalan membawa saksi-saksi ini adalah fatal kepada pembelaan dan bukan pendakwaan. Oleh itu hujahan peguambela adalah tidak bermerit. (Emphasis added.)

[14] Following the Federal Court's case referred to aforesaid, this would amount to a serious misdirection in law which would render the conviction unsafe. We refer to the case of *Alcontara a/l Ambross Anthony v Public Prosecutor* [1996] 1 MLJ 209; [1996] 1 CLJ 705 and to the judgment of His Lordship Edgar Joseph Jr FCJ where His Lordship said as follows:

> To resume our discussion regarding the important point of misdirection as regards the burden of proof, especially the burden on the defence, we must point out, with respect, that it was wrong for the judge to have criticised the defence for having failed to put to the investigating officer, the name of Che Mat or the latter's telephone number or his place of abode, for the simple reason that these particulars had been disclosed in the cautioned statement of the appellant made the day after his arrest so that police had all the time in the world to check their veracity. That being the case, *the onus was on the prosecution, to check on whether the appellant's version of the facts as they appeared in his cautioned statement and to which we have referred, was true or false. In other words, the onus was upon the prosecution to disprove this important part of the appellant's version of facts*. The defence were, therefore, under no duty to put the matters as aforesaid to the investigating officer having regard to their prior disclosure in the cautioned statement. In holding to the contrary, the judge had undoubtedly overlooked the material portions of the cautioned statement touching on Che Mat, reversed the onus, and placed it on the defence, so that on this further ground also, the conviction had to be quashed. (Emphasis added.)

[15] With regards to the unsworn evidence of the appellant (at pp 220–233 of the AR Vol 3) which he chose to give from the dock, the learned judge had this to say:

> Sebagai kesimpulan mahkamah memutuskan bahawa pembelaan pihak tertuduh adalah merupakan penafian dan rekaan semata-mata. Mahkamah dapati keterangan beliau adalah bercanggah mengenai fakta yang material. Oleh kerana keterangan beliau diberi dari kandang salah, keterangan beliau tidak mempunyai nilai dan tidak diberi keberatan oleh mahkamah ini.

[16] We refer to the Court of Appeal in *Azahan bin Mohd Aminallah v Public Prosecutor* [2005] 5 MLJ 334; [2005] 1 CLJ 374, where Gopal Sri Ram JCA decided that:

> For the purpose of a trial, an unsworn statement from the dock is 'evidence'. Hence, an accused who elects to make an unsworn statement from the dock elects to give 'evidence'.

[17] The decision in the case above had been referred to in the case of *Mohd Nazri bin Omar & Ors v Public Prosecutor* [2014] 5 MLJ 644; [2014] 1 LNS 576 where it is decided that:

> We found that the learned trial judge had made an error in not giving any consideration to the third appellant's defence. The unsworn testimony by the appellant should have been given due consideration and not dismissed outright because it did not constitute evidence even though in the final analysis it may not have merits. The defence by the third appellant must be considered before a finding of guilt can be made. Here again we found that the learned trial judge had misdirected himself to the detriment of the third appellant.

[18] Thus, with reference to the aforesaid cases, the learned trial judge had misdirected herself when she failed to appreciate adequately the defence of the appellant. The learned trial judge should have evaluated the evidence against the prosecution's case to find whether the appellant had rebutted the presumption of knowledge and as a whole a reasonable doubt had been raised by the defence. The learned trial judge seemed to have completely dismissed the appellant's defence as an afterthought simply because his evidence could not be challenged by the prosecution and therefore carried minimal weight as compared to the evidence of an accused person which was tested under cross-examination.

The appellant unsworn statement ought not to be altogether brushed aside but the evidence should be taken into account along with other evidence in the case (see *R v Callaghan* (1971) 64 Cr App R 11).

[19] The learned trial judge in this instant appeal failed to give due weight to the following facts raised by the appellant which were:

(a) the appellant had studied about motorcycles as he was working as a salesman after quitting his studies, which proves that the appellant had knowledge and interest in imported motorcycle spare parts to Iran (record of appeal, Vol 3, p 220);

(b) the appellant's friend Farshad was working as a salesman in the motorcycle spare parts before and that is how Farshad was introduced to Akbar and the importing of the motorcycle spare part business (record of appeal, Vol 3, p 225);

(c) the appellant was supposed to come to Malaysia with Mahmud to buy the motorcycle spare parts, but was then informed by Mahmud that he would join the appellant two days later. Therefore, the appellant did not have money to buy the spare parts as he planned to wait for the arrival of Mahmud to buy the spare parts (record of appeal, Vol 3, pp 222–223);

(d) the appellant only met Akbar one day before coming to Malaysia and the appellant was introduced to Akbar through Farshad (record of appeal, Vol 3, p 221). However, there were prior conversations between the appellant and Akbar before they met in Farshad's shop discussing the appellant's travel plans (record of appeal, Vol 3, pp 225–226). It was Farshad who recommended this motorcycle spare part import business to the appellant;

(e) the luggage ('P15') was given to the appellant by Akbar at Farshad's shop and it was corroborated by Behrooz Fatemigarakani Ahmad ('SD2'). The appellant also gave the evidence that he saw nothing suspicious in the bag and further this was submitted by SP4 that P15 was scanned and inspected by him and his team at the scanner area but nothing was found inside the bag. It is therefore clear that the drugs were hidden in the specifically modified compartment of the bag and not visible to the naked eye; and

(f) the conduct of the appellant at the airport drew nothing suspicious because when he was asked to open his bag, he in fact complied with the orders given by SP4 (appeal records, Vol 1, p 38). The appellant also handed his passport to SP4 when asked for it. The conduct of the appellant showed his innocence because if he has the knowledge of the drugs, he would have tried to flee to save his life from the very instance when he was called to scan his bag.

[20] It was the appellant's first visit to Malaysia and he was supposed to be accompanied by Mahmud, who had been abandoned in his travelling plans halfway. His conduct of looking to his left and right at the airport can also be inferred as the appellant being unsure of the new environment. The learned trial judge failed to weigh these factors together. It is evident that the learned trial judge had failed to consider the appellant's evidence at all.

[21] It is incumbent for the learned trial judge to consider the whole of the evidence objectively and from all angles. In that way, the appellant would have a fair chance of being acquitted (see *Gooi Loo Seng v Public Prosecutor* [1993]

2 MLJ 137 (SC) at p 142). Put in another way, all aspects of the defence must be adequately and judicially considered by the trial judge and this was not done in this instant appeal.

[22] At this juncture, it is instructive to reproduce the speech of Chan Sek Keong J (as he then was), delivered in the Court of Criminal Appeal of Singapore in the case of *Neville v Public Prosecutor* [1992] 1 SLR 153, at p 161:

> It is the duty of the trial judge or judges to consider the defence of the accused and the evidence that is adduced in support of that defence. That is fundamental. A failure to carry out that duty will inevitably lead to a miscarriage of justice. Where the evidence adduced at a trial, whether it be adduced by the prosecution or the defence, will exonerate the accused of the offence with which he is charged, or reduce it to some lesser offence, it is also the duty of the trial judge or judges to consider such evidence to determine whether it is sufficient to acquit the accused or reduce the charge, even if the accused himself, whether or not he is represented by counsel, has not raised the particular defence which has that effect. The role of the court is to find whether or not the accused is guilty as charged on the evidence placed before it. But there must be some evidence on which the court can act.

[23] Whilst the court is aware and takes cognisance of the modus of persons like the appellant who come to Malaysia, and the need for relevant authorities to be vigilant so as to ensure that our nation does not become a haven for 'drug tourism', that must be done to the required standard of proof for a criminal trial, ie proof beyond reasonable doubt.

[24] Having perused the grounds of judgment of the learned trial judge, we find that the learned judge had misdirected herself in law. The learned judge failed to give due credence to the evidence of SD2 and SD3 and out rightly rejecting the same as an afterthought of the defence. Therefore, under these circumstances, we allowed the appeal and the decision of the High Court be set aside and the appellant be acquitted and discharged forthwith.

Appeal allowed, conviction and sentence set aside and appellant acquitted and discharged.

Reported by Ashok Kumar